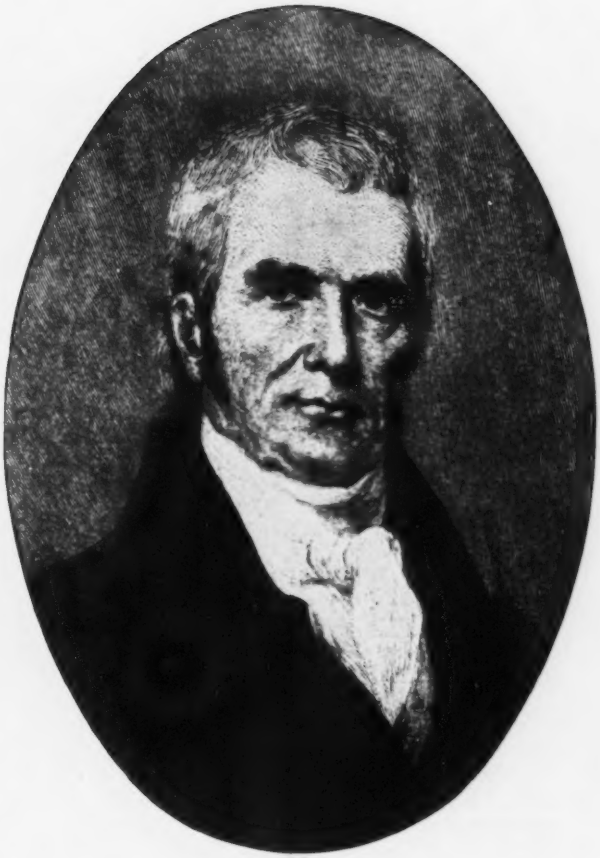

JOHN MARSHALL.

PORTRAIT SUPPLEMENT.—"CASE AND COMMENT."
THE LAWYERS' CO-OPERATIVE PUBLISHING CO.,
ROCHESTER, N. Y.
NEW YORK:
79 NASSAU STREET.
CHICAGO:
110 MONROE STREET.

Case and Comment

NOTES OF

RECENT IMPORTANT, INTERESTING DECISIONS

INDEX TO ANNOTATION OF THE LAWYERS' REPORTS, ANNOTATED

LEGAL NEWS NOTES AND FACETIÆ

VOL. 7. DECEMBER, 1900. NO. 7.

CASE AND COMMENT

Monthly. Subscription, 50 cents per annum post-paid. Single numbers, 5 cents.

THE LAWYERS' CO-OPERATIVE PUB. CO.,
Rochester, N. Y.

NEW YORK, 79 Nassau St. CHICAGO, 116 Monroe St.

Entered at postoffice at Rochester, N. Y., as second-class mail matter.

John Marshall.

The most illustrious of all the names in American jurisprudence is unquestionably that of John Marshall. There have been other great judges in this country, but he stands out among them all conspicuous and colossal. There have been great judges in other lands, but even the greatest of them never did, or had opportunity to do, any work so extraordinary in its nature, and so vast in its results, as the creative work of Chief Justice Marshall, by which, through more than thirty four years of the infancy of this nation and the development of its unique system of government, he built the magnificent and enduring structure of its constitutional law.

The chief incidents in the biography of John Marshall may be briefly summarized. He was born at Fauquier county, September 24, 1755, and was the oldest of fifteen children. His grandfather, who was a native of Wales, had settled in Westmoreland county in 1730, and his eldest son, Thomas, the father of John Marshall, removed to Fauquier county, became the friend of George Washington, was employed by him as a surveyor, and served under him in the Revolutionary War. Later he removed to the mountains east of the Blue Ridge. At fourteen John was sent for instruction in Latin to a clergyman named Campbell, where he remained one year. After the family had removed to Oak Hill he studied Latin another year with a Scotchman named Thomson, and this completed his classical tuition. He became a lieutenant in the American army in 1775, and was afterwards a captain. He was at Valley Forge during the winter of 1778, and fought at Brandywine, Germantown, and Monmouth. He was admitted to the bar in 1780, was chosen representative to the legislature in 1782, and was married in 1783 to Mary Willis Ambler. He resigned his seat in the legislature in 1784, but was re-elected in 1787, and was a delegate to the constitutional convention in 1788. He declined a re-election to the legislature in 1792, and returned to the practice of law, but was re-elected without his consent in 1795. He was offered the post of attorney general and of minister to France, but declined both. Later he was made one of the three ministers to France, with General Pinckney and Mr. Gerry, to avert hostilities with that country. He was elected to Congress in 1799. At the close of his term he was appointed secretary of war, and later secretary of state. He was appointed chief justice of the Supreme Court of the United States on January 31, 1801, at the age of forty-six, and took his seat on February 4. He continued in that court until his death, July 6, 1835. In 1829, while still a member of the court, he was a member of the convention which met to revise the Virginia Constitution.

His services to his country as commissioner to France were of the largest importance. He was welcomed on his return with distin-

guished honors, and then gave himself to the practice of his profession, desiring to withdraw from public life. His country's need of his services, however, was so earnestly impressed upon him by General Washington that he finally consented to be chosen a member of Congress. Here, during that trying period, his reputation, character, and judgment were of exceptional value to the nation. But, while his legislative, diplomatic, and executive services were sufficient to give him a high place among the statesmen of his time, the climax of his career was not yet reached. The judicial system of the new government under the American Constitution was to have unparalleled importance, and it was to be his duty and his glory to guide in its development.

As Chief Justice of the United States John Marshall's career gave him a fame that will doubtless remain forever unequaled. A new dignity and power beyond that ever before conferred upon a court had been given to the Supreme Court of the United States by the Constitution. The court was made a real, vital, and in some sense supreme, branch of the government. It was the work of that court, and in an especial sense the work of John Marshall, to lay the foundations and rear the framework of a new kind of jurisprudence, in which the matters of litigation are enlarged to include the most profound questions of statesmanship, and the very structure and power of the government itself. In all branches of law he was a great judge, but in constitutional law his pre-eminence is unquestioned and enduring. At the time of his appointment the court had been in existence but eleven years, and less than 100 cases had been decided. During the long period of his services on the bench nearly all the fundamental questions of our constitutional law were decided. On nearly all these questions, and in nearly all the famous cases, such as Marbury *v.* Madison, McCullough *v.* Maryland, Dartmouth College *v.* Woodward, and Gibbons *v.* Ogden, he wrote, and doubtless in the main determined, the opinion of the court. He dominated the court, not wilfully, but by the sheer mastery of his extraordinary mind. His fairness and judicial temper kept him as judge from becoming in any case a partisan or an advocate. The clearness of his analysis and reasoning made complex matters seem simple, and that supreme quality of mind that enables one to see things in their just relations, true character, and comparative importance enabled him to exercise a discriminating and sound judgment, in which his associates learned to trust. He would have been honored as a statesman if he had not gone upon the bench, but his noblest title will always be that of the great Chief Justice.

The manhood of John Marshall was of the highest type. Simple in habits, free from false pride, and strong in the homely virtues, he was one of those genuine men who honor the human race. Anecdotes illustrating his character are part of the common stock of our literature. They have been read in the schools by multitudes of boys and girls, who thus gained their first knowledge of Chief Justice Marshall.

The appointment of February 4, 1901, as "John Marshall Day" proves that the nation may honor a great judge no less than a man on horseback wearing epaulettes. The power which this Republic has attained among the nations of the earth has been due to many things; but in no small measure is it due to the welding force of the constitutional doctrines of John Marshall, and most of all is it due to the intellectual and moral qualities of its people, which reached the highest development in their greatest chief justice.

Conversion as a Fraud.

The contention that a judgment for conversion was one of the "judgments in actions for fraud" which are exempt from a discharge in bankruptcy, was made in the case of Burnham *v.* Pidcock, in the New York supreme court, recently, but McAdam, J., refused to sustain it, although the judgment, which was for conversion of two locomotives, was rendered on a declaration in the ordinary fictional form of the common-law action of trover, alleging that defendant found the locomotives, and knew that they were the property of plaintiff, but "contriving and fraudulently intending, craftily and subtly, to deceive and defraud plaintiffs," etc., converted the property to his own use. But the complaint in the action on the judgment alleged that the suit in which it was rendered was brought for the recovery of damages for the "wrongful conversion" of the locomotives, thus defining the gist of the action as "conversion," and not "fraud." The court held that the liability of the defendant on the judgment sued upon did not depend upon either good or bad faith, and although a conversion, even if there was no wrongful taking, was of necessity "wrongful," it was

not necessarily fraudulent, as the action would lie against the defendant no matter how innocent his motives, and irrespective of his knowledge with reference to the rights of the owners. This decision is clearly, and we doubt not rightly, based upon the essential character of the action as distinguished from the mere fiction in the form of pleading.

The Whipping Post.

"If statistics carefully and systematically collated show that corporal punishment tends to keep down the percentage of brutal crime we shall favor its adoption." This language concludes an editorial on the whipping post in the New York Law Journal. It is the language of good sense and sound statesmanship. Objections to the flogging of criminals are obvious, but by no means conclusive, if such punishment can be proved to be in reality a deterrent of crime. Sensible people, however disinclined to favor any punishment that inflicts physical pain, will agree that punishment must, if possible, be made effective for the prevention of crime, and will therefore welcome a demonstration of the efficacy of a punishment, even if it is not in accordance with their taste. Punitive measures must be in some way disagreeable, else they would be a farce. To be effective they must be dreaded, and it may be that physical pain is the one thing that will inspire dread in a certain class of criminals.

The Right of Cities to Drain Sewers into Waters.

A question of increasing importance is as to the right of a city to discharge sewers into streams to the detriment of lower riparian proprietors. A right of such owners to compensation for the damages sustained thereby is denied in Valparaiso *v.* Hagen (Ind.) 48 L. R. A. 707, when the city had statutory authority for this use of the stream, and was not negligent in exercising it. That case holds the damage thus caused does not amount to a taking of the property of the riparian owners. On the other hand, the case of Platt Brothers *v.* Waterbury (Conn.) 48 L. R. A. 691, holds that such a pollution of a river by city sewers, even though it may be justifiable when done for a public purpose, is subject to payment of compensation for the invasion of the property rights of riparian owners. To the same effect are the decisions in Smith *v.* Sedalia (Mo.) 48 L. R. A. 711, and Grey *ex rel.* Simmons *v.* Paterson (N. J.) 48 L. R. A. 717, although the latter case and that of Sayre *v.* Newark (N. J.) 48 L. R. A. 722, hold that, where the tide ebbs and flows, riparian proprietors have no such rights as entitle them to compensation for pollution of the water. Where the statute authorizes sewers to be discharged into streams the only protection of the riparian owner is to be found in a constitutional provision requiring compensation. In states where the Constitution requires compensation for property "taken or damaged" the right seems to be clear. Where the Constitution requires compensation only for property "taken" the question is more difficult. On the question, What constitutes a "taking of property" within the constitutional provision?—the decisions are not consistent. There is a line of cases holding that easements, such as those of light, air, and access to streets, constitutes property for the loss of which compensation must be given if they are destroyed or impaired by an elevated railroad or similar structure. The United States Supreme Court held in Pumpelly *v.* Green Bay & M. Canal Co. 13 Wall. 166, 20 L. ed. 557, that there might be a taking within this constitutional provision without depriving the owner of the title to his lands, when they were overflowed and covered by water, earth, sand, and other material so as to constitute a serious interruption to the common and necessary use of the property. So in Kaukauna Water Power Co. *v.* Green Bay & M. Canal Co. 142 U. S. 254, 35 L. ed. 1004, a riparian owner was held entitled to compensation, among other things, for damages caused by the overflow of a dam, and by the diversion of water from its natural course. The distinction between such damage as may constitute a taking and such damage as shall be deemed merely consequential, for which no compensation can be had, is not very easily drawn, but the reason of the matter requires that such deprivation of the use of property or such limitations of its use as materially depreciate its value, should be deemed to constitute a "taking." Therefore, the pollution of the waters of a stream, whereby the property of a riparian owner is much reduced in value and its use for some valuable purposes destroyed, seems to be clearly sufficient to constitute a taking of his property.

Loss by Check Delivered to Impostor.

The question, Who shall bear the loss caused by payment of a check that the drawer has delivered to an impostor? is one of peculiar difficulty. The fundamental rule is that the bank must pay the money of a depositor only to him or to someone to whom he directs the bank to pay it. Therefore, when the drawer has made a check and delivered it to the true payee, or to his authorized agent, and the bank thereafter pays the check on a forged indorsement of the payee's name, the liability of the bank to bear the loss is unquestionable, whether it has been guilty of any negligence or not. But there are confusion and difficulty in the cases in which the drawer has delivered the check, not to the payee named therein or to his lawful agent, but to someone who falsely impersonates such agent or payee, and thereafter succeeds in obtaining the money on a false indorsement.

The grounds on which should be based the liability, whether of the bank or of the drawer, to sustain the loss, are not clearly settled. The cases which hold that the bank is protected in paying a check to such an impostor may put the decision on the grounds, first, that this effectuates the drawer's intent; second, that the drawer has been guilty of negligence; third, that the payee is to be treated as a fictitious person; or fourth, that the drawer is estopped to deny that the person to whom he gave the check was the person he intended should have it.

The theory that a bank which pays a check to an impostor to whom the drawer delivered it thereby effectuates the drawer's intent, and is therefore protected because it does what it was directed to do, has been adopted by most courts. This, of course, applies only to cases in which the impostor claimed, and was actually believed by the drawer, to be the payee named, but not to cases in which the impostor claimed to be a mere agent of the payee, or to cases in which, while he claimed to be the payee, the drawer suspected the imposture, but nevertheless took the chances of giving him the check. But there is a fallacy in the theory that the drawer intended to make the impostor the real payee. To say this is only partly true. When he makes a check payable in terms to one person, and delivers it to another whom he believes to be, but who is not, the payee named, his intent that the person into whose hands he puts the check shall be the payee is no clearer than his intent to make the check payable to the person whom he expressly names as the payee. It is just as true to say that his real intent is that the payee named shall be the actual payee, as to say that his intent is that the person to whom it is delivered shall be the actual payee. The truth manifestly is that he intends both, because he believes that the payee named is identical with the person to whom he hands the check. The imposture makes it impossible that both parts of his intent can be carried out. To say that either the payee named, or the person to whom the check is delivered, is the payee actually intended, is to misrepresent the fact. Therefore, a decision which protects the bank in paying a check delivered to an impostor on the ground that this effectuates the actual intent of the drawer is based upon a manifest fallacy.

The theory that the drawer's negligence justifies the bank in paying the check to an impostor on a false indorsement might also be adopted, but this theory, even if sound as applied to cases in which the drawer was actually negligent, has no application to cases in which the imposture was successful without any fault or negligence on the part of the drawer. After taking all the precautions that any ordinarily prudent man would take, the drawer of a check may be fraudulently induced to give the check to an impostor. It is at least conceivable that the imposture may be skilful enough to deceive both the drawer and the bank without any negligence on the part of either. In that case the bank, if protected in paying the check, must be protected on some other ground than that of the drawer's negligence. If the drawer was in fact negligent, and the bank was not, this may be a sufficient reason for throwing the loss on the drawer.

The question of the bank's negligence arises in some cases. But it can properly arise only as an incident, and not as the main ground of liability, since the real basis of the bank's liability for the loss is that it is a debtor of the depositor, and its payment of a check out of his deposit without any authority from him must be at its own loss, whether it was negligent or not. The failure of a bank to take any precautions for identifying a person to whom it pays a check is merely a risk that it takes on its own account. If it pays the right person it is protected, no matter whether it took any precautions or not. If it pays the wrong person it will not be protected by any amount of care that it may have exercised. But, if the bank claims that

the drawer's negligence has resulted in deceiving the bank, its own negligence in respect to the same transaction may be material. That is to say, if a liability is based on negligence, contributory negligence becomes important. On such a theory the results of these cases would be exceedingly unsatisfactory. If both parties were negligent the doctrine of contributory negligence would defeat the plaintiff, whichever party might be the plaintiff, so that on the same state of facts the bank would have to bear the loss if it brought the suit, but not if it happened to be the defendant.

The theory that an instrument payable to a fictitious person shall be deemed payable to bearer has been applied in at least one instance to a case of this class. But this is contrary to the general rule that such an instrument shall be regarded as payable to bearer only when the drawer knew that the payee was not a real person. Therefore, this theory does not seem properly applicable to a check given to an impostor.

The most satisfactory theory on which to base the decisions which protect a bank in paying a check to an impostor who has procured it from the drawer is that of estoppel. While it cannot truthfully be said that the bank carried out the intent of the drawer in making such payment, it can be said that the drawer, by putting the check into the hands of a person whom he thereby holds out as the payee named, is estopped, as against a bank which acts upon such representation, to deny that he intended to make such person the payee. Most of the cases which protect the bank put it on the ground that the bank has carried out the actual intent of the drawer. The fallacy of that position is unmistakable, but it may be said with much reason that the bank has carried out the drawer's apparent intent, which he is estopped to deny. Some question might be raised as to the right of the bank to rely on the fact as an estoppel that the drawer delivered the check to the impostor unless the bank knew that fact when it cashed the check. But a knowledge of the facts constituting an estoppel which must be possessed by the party acting upon them, and deceived by them, is sufficient if it extends to the facts which mislead, without extending also to each link in the chain of causes which produced those facts. It is certainly not true that a man who has created a deceptive appearance can avoid an estoppel in favor of a person who has been deceived by such appearance, merely because the deceiver had concealed his part in the deception until after the other party had been victimized. To trace the responsibility for the false appearance to the party estopped is a matter of proof, but this may be done after the false appearance has been innocently acted upon.

Index to Notes

IN

LAWYERS' REPORTS, ANNOTATED.

Book 49, Parts 3 and 4.

Mentioning only complete notes therein contained, without including mere reference notes to earlier annotations.

The part containing any note indexed will be sent with CASE AND COMMENT for one year for $1.

Among the New Decisions.

Appeal.

An appeal by the state in a criminal case from a general verdict of not guilty, which was entered upon motion of defendant because the warrant was issued without any affidavit, was held, in State *v.* Savery (N. C.) 49 L. R. A. 585, not to be allowable on the theory that the verdict was equivalent to quashing the indictment under a certain Code provision, where no motion to quash was made, and the court refused to withdraw a juror and dismiss the action.

Associations.

A committee of a board of trade appointed to determine the rights in a margin deposit is held, in Ryan *v.* Cudahy (Ill.) 49 L. R. A. 353, to be a tribunal of limited jurisdiction, the judgment of which is not binding unless the proceedings are in accordance with the charter and by-laws of the board; and such judgment can be reviewed by a court in case of an abuse by unwarranted procedure of the committee.

A by-law of a board of trade which provides for the investigation of grave charges against a member by a committee of the directors in order to determine the necessity of preferring formal charges against him is held, in Green *v.* Board of Trade (Ill.) 49 L. R. A. 365, not to be unreasonable or in contravention of public policy, although the investigation is made without the knowledge of the member, and the charges, if preferred, are to be tried by the directors without permitting the defendant the aid of professional counsel.

The contractual relation between an association and one of its members being that which exists by virtue of the rules of the association, it was held, in Lawson *v.* Hewell (Cal.) 49 L. R. A. 400, that the courts will decline to take cognizance of any matter arising under them in respect of matters of policy or the internal economy of the organization, and therefore the court refused to restrain a chapter of Royal Arch Masons from proceeding with the trial of charges against a member in accordance with the rules of the order on the ground that a rule which he was charged with violating was invalid because adopted as the result of a conspiracy.

A by-law of a liverymen's association which binds the members not to do business with any person who does not patronize its members exclusively, and prevents any of them from letting a hearse to a private party for a funeral where the undertaker in charge is reputed to patronize nonunion liveries, or to any person whose family for the occasion patronize a nonunion livery, is held, in Gatzow *v.* Buening (Wis.) 49 L. R. A. 475, to be unlawful as against public policy.

Assumpsit.

The rule that money paid under a mistake of fact without any fraud, when both parties are innocent and ignorant of the mistake, cannot be recovered back, is applied in Behring v. Somerville (N. J.) 49 L. R. A. 578, where money was paid on a mortgage to a supposed assignee who had possession of the mortgage, when the assignment was invalid because of a prior valid assignment to another person.

Attorneys' Fees.

A provision in a trust deed for attorney's fees in case the property is sold under the deed is held, in Turner v. Boger (N. C.) 49 L. R. A. 590, to be void as against public policy.

Banks.

A bank discounting negotiable paper for one who is not its debtor, and placing the amount to his credit by way of deposit, is held, in Warman v. First National Bank (Ill.) 49 L. R. A. 412, not to be a purchaser of the paper. But it is not deemed sufficient to show that the paper is not purchased by showing merely that the proceeds are credited to him, without showing from the state of the account that the transaction was not such as to make the bank a purchaser.

Bonds.

Statements made on the face of municipal bonds as to the purpose for which they were issued are held, in Huron v. Second Ward Sav. Bank (C. C. A. 8th C.) 49 L. R. A. 534, to constitute an estoppel against the municipality which will prevent the controverting of such statements for the purpose of invalidating the bonds in the hands of bona fide purchasers.

Carriers.

A street-car passenger who was injured after leaving the car and while attempting to pass behind it in the dark, by falling over a fender which had become disarranged without the knowledge of the company, and was projecting from the rear of the car, is, in Gargan v. West End St. R. Co. (Mass.) 49 L. R. A. 421, denied any right to recover against the street railway company for the injury.

The accidental death of a sick passenger, who was supposed by the railway employees to be intoxicated, and who was helped from the car at the terminus of the route and led to the front of the station, at or near to the public street, and left where the way was open in which he wished to go, but who, after the train had started again on its trip, turned and went toward the back of the station and slipped between the wheels of a car moving on a track, is held, in Bageard v. Consolidated Traction Co. (N. J.) 49 L. R. A. 424, to create no right of action against the carrier.

A rule of a street railway company requiring passengers to board the cars within a station, and compelling one who does not to pay fare, even though he had previously paid in the station, is held, in Nashville Street Railway v. Griffin (Tenn.) 49 L. R. A. 451, to be a reasonable regulation, but one which must be enforced in a reasonable manner, and therefore unenforceable as against one who, after paying fare in the station, is obliged to go outside to take a car about ready to start, or else wait twenty minutes for another car.

The fact that a purchaser of a round-trip excursion ticket is unable to read or write, and is not specially notified of the conditions upon it, is held, in Watson v. Louisville & N. R. Co. (Tenn.) 49 L. R. A. 454, insufficient to relieve him from the effect of a condition requiring the return part of the ticket to be stamped in order to be used.

The loss of perishable freight on account of the lack of proper refrigeration, when shipped in refrigerator cars, is held, in New York, P. & N. R. Co. v. Cromwell (Va.) 49 L. R. A. 462, to make the railroad company liable to the shipper, although the cars were leased by the railroad company from a transportation company which agreed to keep them properly refrigerated.

Conflict of Laws.

An action to enforce the liability of stockholders for corporate debts, under a statute which provides a single mode of enforcement by a single suit in the state courts in favor of all creditors and against the corporation, if it has assets, and all stockholders, is held, in Finney v. Guy (Wis.) 49 L. R. A. 486, to be maintainable only in that state, and not in any court out of the state.

The prohibition against contracts by common carriers for relief against their common-law liability, which is contained in the state Constitution, is held, in Tecumseh Mills v. Louisville & N. R. Co. (Ky.) 49 L. R. A. 557, to be inapplicable to a contract of a railroad

company created by that state, which is made in another state, for transportation of goods to be performed entirely outside of the state.

Contracts.

Recovery for the value of the work done under a contract to move a building for a specified price, the performance of which becomes impossible by reason of the destruction of the building, without the contractor's fault, before the work was completed, is held, in Angus *v.* Scully (Mass.) 49 L. R. A. 562, to be recoverable.

An agreement by members of a voluntary benefit association, that the decision of its tribunals rejecting a claim to benefits shall be conclusive, is upheld in Hembeau *v.* Great Camp of the Knights of the Macabees (Mich.) 49 L. R. A. 592, against a contention that it violates public policy as an attempt to oust the courts of jurisdiction.

A contract by sellers of ice to purchase from another all the ice necessary to carry on their business for a period of five years is held, in Hickey *v.* O'Brien (Mich.) 49 L. R. A. 594, not to be void for uncertainty, or subject to termination by a transfer of the business within that period.

Corporations.

A contract for the employment, during life, of a person to act in a medical capacity for a life insurance company is held, in Carney *v.* New York Life Ins. Co. (N. Y.) 49 L. R. A. 471, to be in excess of the authority conferred upon the president and actuary by a by-law empowering them to "appoint, remove, and fix the compensation of each and every person, except agents, employed by the company," where the members of the board of trustees, to whom the management and control of the corporation are given, hold office only for four years each.

Courts.

The right of the members of a fraternal organization to resort to the courts when their claims have been submitted to and finally rejected by officers and tribunals to whom the rules or laws of the organization require the claims to be submitted is sustained in Supreme Lodge of the Order of Select Friends *v.* Raymond (Kan.) 49 L. R. A. 373, where it is held that, if the right of resort to the courts can be taken away at all, it can be done only where the restriction is stated in the clearest and most explicit terms.

The affinity of husbands of an aunt and niece is held, in State *ex rel.* Perez *v.* Wall (Fla.) 49 L. R. A. 548, to be such as to disqualify the one from sitting as a judge in a case where the other is an interested party.

Damages.

Damages to a dwelling house by settling and cracking of the walls, caused by the improper manner of constructing a subway on the street, are held, in Stork *v.* Philadelphia (Pa.) 49 L. R. A. 600, not to be a part of the compensation which can be assessed for property "taken, injured, or destroyed" by such public improvement, since those damages extend only to injuries which are the direct, immediate, and necessary or inevitable consequences of the act of eminent domain itself, irrespective of the care or negligence in the doing of it.

Death.

Substantial damages for an instantaneous death caused by wrongful act are held, in Broughel *v.* Southern New England Teleph. Co. (Conn.) 49 L. R. A. 404, to be recoverable under a statute providing for the survival of all causes of action for injuries to the person of a decedent, whether they do or do not instantaneously or otherwise result in death.

Easements.

An easement in an alley across the rear end of an adjacent lot is held, in Irvine *v.* McCreary (Ky.) 49 L. R. A. 417, to be created as incident or appurtenant to a building sold by the common owner, when the alley furnishes access to a cellar under the building, as well as light and air for the rear portion of it.

Eminent Domain.

A telephone company organized under a statute providing for "a telegraph and telephone line," which formerly read "a telegraph or telephone line," is held in San Antonio & A. P. R. Co. *v.* Southwestern Teleg. & Teleph. Co. (Tex.) 49 L. R. A. 459, to be entitled to exercise the power of eminent domain under a statute giving such power to corporations created for the purpose of constructing and maintaining "a magnetic telegraph line."

who was supposed by the railway employees to be inapplicable to a contract of a railroad

Gas.

A rule of a gas company, consented to by the consumer, that it will cease to furnish gas when the consumer becomes delinquent in paying bills therefor, is held, in Mackin *v.* Portland Gas Co. (Or.) 49 L. R. A. 596, to be enforceable by discontinuing the gas supply at one set of premises until payment of a delinquent bill for gas previously furnished the consumer at other premises.

Highways.

A license fee for the use of streets by private vehicles is held, in Chicago *v.* Collins (Ill.) 49 L. R. A. 408, not to be within the power conferred upon a city for regulating the use of streets.

Husband and Wife.

A letter of credit in favor of husband and wife, purchased with the husband's money, is held, in *Re* Parry (Pa.) 49 L. R. A. 444, to create an estate by the entireties, so that in case of his death the balance may be drawn by her without accounting therefor to his estate.

Infants.

The liability of an infant in tort for false representations as to his age, whereby he obtains credit in the purchase of goods, is denied in Slayton *v.* Barry (Mass.) 49 L. R. A. 560.

Innkeepers.

An innkeeper's lien upon property of a third person brought to the inn by a guest is denied in McClain *v.* Williams (S. D.) 49 L. R. A. 610, where the statute gives a lien on property of guests, and provides that effects "belonging to" any person who departs without paying his bill may be sold to satisfy it.

Insurance.

A decision by an association of persons jointly liable on a policy of insurance to one of its members, which provides that the association shall finally determine the amount due on any loss, although not strictly an award, is held, in Perry *v.* Cobb (Me.) 49 L. R. A. 389, to be binding on the member except for cause shown to the contrary.

An insurance agent forbidden to take a risk, but whose clerk forges his name to a policy without his consent and without any profit to him, is held, in Bradford *v.* Hanover Fire Ins. Co. (C. C. A. 3d C.) 49 L. R. A. 530, not to be liable for the loss on the risk.

Landlord and Tenant.

Statements in letters written by a landlord to his tenant after the latter has abandoned the premises, to the effect that the premises will be leased at the tenant's risk, when they are not replied to, are held, in Gray *v.* Kaufman Dairy & Ice Cream Co. (N. Y.) 49 L. R. A. 580, insufficient to avoid the rule that a surrender is effected by the reletting, with the consent of the former tenant, on the ground that by his silence the tenant acquiesced in the landlord's proposition.

Libel.

Placing a debtor's name on a blacklist as one who does not pay his honest debts is held, in Weston *v.* Barnicoat (Mass.) 49 L. R. A. 612, to constitute a libel for which he is entitled to damages, notwithstanding the fact that he may not have paid his debt, where there was a valid counterclaim which justified its nonpayment.

License.

An ordinance providing for the licensing of all persons selling or offering to sell on the streets, or soliciting orders from house to house, when it makes no discrimination on any ground, is held, in Brownback *v.* North Wales (Pa.) 49 L. R. A. 446, not to be invalid as to residents of the state on the ground that it works a discrimination against them and in favor of nonresidents, as to whom it may be invalid.

A parol license from one lotowner in a town to another, to pass a tile drain under the former's lot for the purpose of drainage, is held, in Pifer *v.* Brown (W. Va.) 49 L. R. A. 497, to be revocable at the pleasure of the licensor.

Mortgages.

A stipulation in a deed of trust that foreclosure shall create the relation of landlord and tenant between the purchaser and mortgagor, and that upon the latter's default in surrendering possession he may be removed

by a writ of unlawful detainer, is held valid in Griffith v. Brackman (Tenn.) 49 L. R. A. 435.

Municipal Corporations.

A bona fide attempt to incorporate a town under a statute authorizing the incorporation is held, in Gilkey v. Howe (Wis.) 49 L. R. A. 483, sufficient to make orders issued by the town which there has been an attempt to organize enforceable.

An exemption of private corporations from taxation for a period of years on condition of their locating manufacturing establishments in the town is held valid in Crafts v. Ray (R. I.) 49 L. R. A. 604, and this is not deemed to violate a constitutional provision requiring the burden of taxation to be fairly distributed.

Newspapers.

A statute making it an offense to sell, lend, or give away a paper made up principally of criminal news, police reports, and pictures and stories of bloodshed, lust, and crime is held valid in State v. McKee (Conn.) 49 L. R. A. 542, and not to infringe the constitutional liberty of the press.

Pardon.

Statutory limitations on the pardoning power of the executive are held, in Territory v. Richardson (Okla.) 49 L. R. A. 440, to be invalid on the ground that the pardoning power is exclusive of the legislative or judicial authority.

Partition.

Partition of oil and gas owned by co-owners separate from the surface is held, in Hall v. Vernon (W. Va.) 49 L. R. A. 464, not to be within the power of a court to decree except by sale and division of the proceeds, and a judicial partition by assignment of the oil and gas under sections of the surface is held to be void.

Partnership.

A union and co-operation of tenants in common or joint tenants of an oil lease in the working of it is held, in Childers v. Neely (W. Va.) 49 L. R. A. 468, to constitute a mining partnership which will not be dissolved by the sale of the interest of one member to another or to a stranger.

Public Improvements.

The right to assess upon the remaining lands of a person any part of the amount of the compensation to be paid him for lands taken by appropriation proceedings, or any part of the costs and expenses incurred therein, is held, in Cincinnati, L. & N. R. Co. v. Cincinnati (Ohio) 49 L. R. A. 566, to be unconstitutional.

Public Money.

An appropriation of public money to pay to the widow, heirs, or legal representatives of a person who died in office the salary for any unexpired part of his term is held, in Opinion of Justices (Mass.) 49 L. R. A. 564, to be within the power of the legislature, where the public good will be served by the grant of such a reward, but not where the only public advantage is such as may be incident to the relief of a private citizen.

Religious Societies.

A change of belief on the part of a majority of the members of a church by the rules of which the majority have the right to control is held, in First Baptist Church v. Fort (Tex.) 49 L. R. A. 617, to be insufficient to defeat their right to control, or to give the minority the right to interfere in order to prevent the use of the church property for teaching the new beliefs.

Specific Performance.

An oral contract by an aged person living alone in apparent destitution, whereby she agrees to give all her property, both real and personal, but which is of no great amount, to a husband and wife in return for their maintaining, caring for, and supporting her during life and after her death giving her decent burial, is held, in Bryson v. McShane (W. Va.) 49 L. R. A. 527, to be one which may be specifically enforced in equity after it has been executed by the other parties in all respects, but she has failed to execute any conveyance.

Taxes.

A patented article which is leased or rented by the patentee for a valuable consideration is held, in State *ex rel.* Guilbert v. Halliday (Ohio) 49 L. R. A. 427, to be taxable at its

shown to the contrary.

surrendering possession he may be removed

true value in money, although that value is enhanced by reason of the patent.

Timber.

The right of a cotenant to sell the right to cut logs from land owned in common, so that the purchaser can convey a good title to them, is denied in Nevels *v.* Kentucky Lumber Co. (Ky.) 49 L. R. A. 416.

Trial.

The qualification of Odd Fellows as jurors in an action by another Odd Fellow of a lodge to which they belong on a lease assigned to him by his lodge is sustained in Reed *v.* Peacock (Mich.) 49 L. R. A. 423.

Usury.

A provision in a bond for more than the legal rate of interest after maturity by way of a penalty to insure prompt payment of the debt is held, in Ward *v.* Cornett (Va.) 49 L. R. A. 550, not to constitute usury.

Vaccination.

A statute permitting municipal authorities to make regulations for the vaccination of the inhabitants under direction of the local board of health, is sustained in State *v.* Hay (N. C.) 49 L. R. A. 588, as within the power of the legislature, and an ordinance requiring compulsory vaccination is held not to be invalidated by failure to exempt persons whose health renders their vaccination unsafe.

Waters.

A water company which fails to supply sufficient water for fire purposes, although the failure is due to a breaking of the pipes without any fault of the company, is held, in Middlesex Water Co. *v.* Knappman Whiting Co. (N. J.) 49 L. R. A. 572, to be liable to a consumer for the loss of property by fire, where the company had expressly contracted to furnish a supply for fire purposes.

New Books.

"Annotated Constitution of Texas." By D. B. Axtell. (Gammel Book Co., Austin, Tex.) 1 Vol. $5.

"Tiffany's Criminal Law." 5th Ed. By Andrew Howell. (Richmond & Backus Co., Detroit, Mich.) 1 Vol. $6.50.

"Equity Principles." By Charles E. Hogg. (The Robert Clarke Co., Cincinnati, Ohio.) 1 Vol. $7.50.

"Brewer & Laubscher's Ohio Private Corporations." (Same Publisher.) 1 Vol. $4.

"West Virginia Criminal Digest." By T. J. Hugus. (Same Publisher.) 1 Vol. $3.50.

"Whittaker's Code Forms." (W. H. Anderson & Co., Cincinnati, Ohio.) 1 Vol. $6.

"Bates's Ohio Digest." Vol. 3. (Same Publisher.) $6.

"Mills's Colorado Digest." (The Mills Publishing Co., Denver, Colo.) 2 Vols. $20.

"Annotated Colorado Decisions." Vol. 1. (Same Publisher.) $5.

"Supplement to Pattison's Complete Digest." Vol. 5. (Gilbert Book Co., St. Louis, Mo.) $7.50.

"Digest of the Canadian Law Times." (The Carswell Co., Limited, Toronto, Ont.) 1 Vol. $6.

"Shareholders and Directors' Manual." By J. D. Warde. (Same Publisher.) 1 Vol. $3.

"The Yearly Practice of the Supreme Court, 1901." (Butterworth & Co., London, Eng.) 1 Vol. 20s.

"The Lawyer's Remembrancer and Pocket Book for 1901." (Same Publisher.) 2s 6d.

Recent Articles in Law Journals and Reviews.

"Preferences, Guilty and Innocent."—6 Virginia Law Register, 455.

"Essentials of a Valid Marriage in Virginia."—6 Virginia Law Register, 437.

"Proof of Marriage in Criminal Cases."—51 Central Law Journal, 321.

"The Proper Preparation for the Study of Law."—39 American Law Register, N. S. 633.

"The Coefficients of Impurity."—39 American Law Register, N. S. 647.

"Does the Relation of Landlord and Tenant Become Severed by Operation of the Bankrupt Law?"—39 American Law Register, N. S. 656.

"The Development of Patent Law."—26 Law Magazine and Review, 5.

"Trading with the Enemy."—16 Law Quarterly Review, 397.

"The Forms of Political Union."—16 Law Quarterly Review, 369.

"The Fault in Cases of Collision at Sea, and the Responsibility of Shipowners."—16 Law Quarterly Review, 355.

"The Corporation Sole."—16 Law Quarterly Review, 335.

"Life of a Judgment of a Federal Court in Favor of the United States."—51 Central Law Journal, 343.

"Support of Pauper Relatives."—64 Justice of the Peace, 723.

"Relation of the Bench and Bar."—62 Albany Law Journal, 292.

"Common Encroachments on Constitutional Liberty."—1 North Carolina Law Journal, 273.

"The Interpretation of Treaties."—26 Law Magazine and Review, 62.

"Indian Judicial Administration."—26 Law Magazine and Review, 54.

"Civil Judicial Statistics."—26 Law Magazine and Review, 19.

"Preparation for Trial: Witnesses and Their Examination."—3 Brief of Phi Delta Phi, 1.

"Suppression of Vice: How Far a Proper and Efficient Function of Popular Government."—3 Brief of Phi Delta Phi, 17.

"An Old Slander: The Supreme Court and the Legal Tender Decisions."—3 Brief of Phi Delta Phi, 29.

"The Veto Power as Seen from a Comparative Study of American Constitutions."—6 Western Reserve Law Journal, 134.

"Some Errors in the Law of Fixtures."—51 Central Law Journal, 381.

"The Elasticity of the Constitution."—14 Harvard Law Review, 200.

"Liability for Negligent Language."—14 Harvard Law Review, 184.

"A Hundred Years of American Diplomacy."—14 Harvard Law Review, 165.

"The Law of Confessions."—1 Bombay Law Reporter, 217.

"Ancient Hindu Procedure."—10 Madras Law Journal, 275.

"Contracts in Restraint of Trade."—36 Canada Law Journal, 612.

"Negotiable Instruments."—1 North Carolina Law Journal, 291.

"Statutes are Unconstitutional Which Impose the Cost of a Public Improvement upon Adjacent Lands According to the Frontage or Areas thereof, without Any Reference or Limit to the Extent or Ratio of Special Benefit thereto."—51 Central Law Journal, 423.

"The Law of Surface Water as Applicable to Missouri and States bounded by Large Rivers."—51 Central Law Journal, 360.

"Ignorance or Mistake of Law a Ground for Equitable Relief."—6 Western Reserve Law Journal, 95, 125.

"Proof of Marriage in Criminal Cases."—51 Central Law Journal, 321.

"The Law of Names."—20 Canadian Law Times, 319.

The Humorous Side.

LIKED THE OTHER MOTTO BETTER.—A decorator employed to fresco the county courtroom in a certain western courthouse printed in bold gilt letters over the judge's chair the words "Ignorantia juris non excusat." This legal maxim, so peculiarly appropriate to a temple of justice, was very pleasing to the members of the bar, but for some reason the judge caused it to be obliterated and replaced by the words "Fiat justitia, ruat cœlum."

REFORMING THE PRACTICE IN REPLEVIN.—The following verdict was recently rendered in a Florida case of replevin for a house that had been removed from the plaintiff's land: "We, the jury, do find in said case of M. v. B. that the defendant shall pay the plaintiff $50 for the house taken and that the defendant retain the house, but, if the defendant does not pay the $50, he shall return the house to the plaintiff and pay costs but no damages." Considering that this was a replevin action to recover the property itself this ingenious verdict, by which the jury decided to sell the house to the defendant for $50 and throw in the claim for damages, illustrates the growth of the reformed procedure.

THE PLENARY POWERS OF THE JUSTICE.—A correspondent writes that in a certain family history it is related that, "when Morgan county, Illinois, was first organized, a certain farmer was selected for a justice of the peace. When the county was added to a circuit and a supreme court justice came down to hold a court, this justice of the peace, with the county attorney and others, called on him. The justice of the peace said: 'Judge, I want to ask you a question of law.' 'Ask your county attorney and these other lawyers of your county,' said the judge. 'Oh, I know as much law as those fellows. I want to ask you.' 'Well, what is it,' said the judge. 'Can a justice of the peace grant a divorce?' 'Certainly not, he has no jurisdiction,' said His Honor. 'Well, Judge, you're wrong,' said the justice of the peace. 'He can, for I granted one myself yesterday, and the gal's gone back to Missouri, and the man's working down there in that field.'"

1 Vol. $5.

[Quarterly Review, 369.